United States Courts
Southern District of Texas
FILED
JAN 21 2004
Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE ENRON CORPORATION SECURITIES, DERIVATIVE & ERISA LITIGATION	MDL 1446
MARK NEWBY, et al., Plaintiffs, v. ENRON CORPORATION, et al., Defendants.	Civil Action No. H-01-3624 and Consolidated Cases
SILVERCREEK MANAGEMENT INC., et al. Plaintiffs, v. SALOMON SMITH BARNEY, INC., et al., Defendants.	Civil Action No. H-02-3185

REPLY MEMORANDUM OF DEFENDANT GOLDMAN, SACHS & CO. IN FURTHER SUPPORT OF ITS MOTION FOR CLARIFICATION AND RECONSIDERATION OF THE COURT'S DECEMBER 10, 2003 MEMORANDUM AND ORDER AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR CLARIFICATION

Preliminary Statement

Despite their rhetoric and creative arguments, plaintiffs cannot and do not dispute the central point of Goldman Sachs' motion for clarification and reconsideration—namely, that in declining to dismiss plaintiffs' Section 11 claim, the Court in its decision relied upon a previously-stricken declaration and upon allegations in a proposed amended complaint that had never been approved for filing nor filed as the operative complaint. Unable to defend those

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issues on their merits, plaintiffs instead simply declare, ipse dixit, that the Court could have reached the same conclusion without relying on the Morwick Declaration and that the proposed amended complaint should be "deemed filed." But the Court did rely upon those documents, and the fact remains that the original complaint is the only operative one and fails to state a claim under Section 11. So we respectfully ask the Court to reconsider its decision and dismiss that complaint. Should the Court permit filing of the proposed amended complaint (which will only then become the operative complaint), Goldman Sachs respectfully requests an opportunity to submit briefs on a motion to dismiss the amended complaint.

Plaintiffs in their cross-motion urge that the Court's dismissal of their common law claims be deemed a dismissal without prejudice, allowing them leave to amend. Such a result would contradict the Court's July 11, 2003 Scheduling Order, which governs the filing of amended pleadings in this case and which provides that amended pleadings should not contain claims that have been dismissed. In any event, the claims that the Court dismissed suffer from fatal legal deficiencies, so that re-pleading them in an amended complaint would be futile because they still would not survive a motion to dismiss.

Goldman Sachs' Motion for Clarification and Reconsideration

1. Through their "deemed filed" argument, plaintiffs effectively concede that their proposed amended complaint has not been filed, that the Court erroneously relied on it, and that only the original complaint is operative. The chronology so confirms. On March 28, 2003, plaintiffs filed a motion for leave to file an amended complaint. The proposed amended complaint seeks to add claims under Section 10(b) of the Securities Exchange Act of 1934 and the Texas Securities Act to the Section 11 and common law claims asserted against Goldman Sachs in the original complaint. The proposed amended complaint also seeks to add new allegations purporting to support plaintiffs' Section 11 claim on the 7% Exchangeable Notes and

would add a new Section 11 claim relating to Enron's 2001 Zero Coupon Notes. The Court has not ruled on the motion for leave to file an amended complaint, but the Court in its December 10, 2003 Memorandum and Order referred to the allegations of that proposed amended complaint in declining to dismiss plaintiffs' Section 11 claim.

2. Plaintiffs argue that a stipulation they entered into with co-defendants Salomon Smith Barney and Banc of America Securities--but not with Goldman Sachs--provided for the automatic filing of their amended complaint with no action by the Court. Pl. Opp. ¶¶ 11-12. However, as elaborated in the reply of those two signatories to that stipulation, the stipulation expressly contemplated that the Court would either grant or deny plaintiffs' motion for leave to amend the complaint, which has never happened. Banc of America/Salomon Reply at ¶ 3; Stipulation and Order, dated April 17, 2003 (noting that, notwithstanding the consent of Salomon and Banc of America to the motion for leave to amend the complaint, the Court could still deny the motion).

3. Since their proposed amended complaint has never actually been permitted to be filed, plaintiffs argue that it should be "deemed filed" because no party opposed their motion for leave to amend. But when plaintiffs signed the stipulation on April 17, 2003, they knew that no opposition had been filed—yet they signed a stipulation that contemplated that the motion for leave to amend might be denied rather than granted. More importantly, plaintiffs' argument misses the point. Whether opposed or not, there was in fact no formal filing of the proposed amended complaint as the operative pleading, so there has been no occasion or opportunity for Goldman Sachs to address the proposed amended complaint's new allegations. If and when such a filing is permitted, Goldman Sachs will move to dismiss.

4. Plaintiffs similarly do not dispute that the Court's December 10, 2003 Memorandum and Order also relied upon the Morwick Declaration, nor do they dispute that the Declaration was stricken from the record. Given that reality, plaintiffs are constrained to argue with respect to the Section 11 claim that the Court "can reach the same conclusion that it did in its December 10, 2003 Memorandum and Order without considering the Declaration of Louise Morwick." Pl. Opp. at ¶ 14. But the Court did consider it, and plaintiffs make no effort to show that the Section 11 claim could survive without the Court's consideration of that declaration and of the allegations in the proposed amended complaint.

5. Goldman Sachs therefore respectfully asks that the Court reconsider its ruling on the Section 11 claim without reference to the allegations of the proposed amended complaint or the Morwick Declaration and dismiss the claim directed at Goldman Sachs. Alternatively, if the Court is inclined to permit filing of the proposed amended complaint, then we ask the Court to afford Goldman Sachs an opportunity to submit a motion to dismiss the amended complaint.

6. Finally, we note that plaintiffs do not dispute that Goldman Sachs, Salomon, and Banc of America have not had an opportunity to respond to the new allegations in the proposed amended complaint, and plaintiffs acknowledge that defendants should be allowed to do so in a motion to dismiss that pleading. Pl. Opp. at ¶ 13. Plaintiffs also do not object to the schedule for filing and briefing a motion to dismiss set forth in the Court's July 11, 2003 Scheduling Order. Pl. Opp. at ¶ 16. We therefore respectfully urge that the Court's order on Goldman Sachs' motion for clarification and reconsideration include provisions incorporating those unopposed points, to the extent the Court decides to permit the amendment.

Plaintiffs' Cross-Motion for Clarification

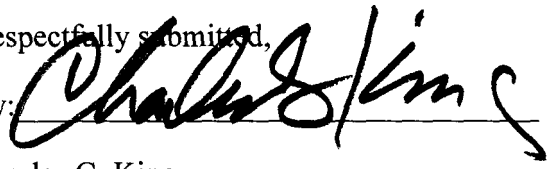
7. Plaintiffs ask the Court to "clarify" that the common law claims it dismissed in its December 10, 2003 Memorandum and Order be deemed dismissed without prejudice and with leave to amend. At the threshold, plaintiffs' request contradicts the Court's July 11, 2003 Scheduling Order, which governs the filing of amended pleadings. That Order explicitly provides that amended pleadings shall not reiterate allegations the Court has already rejected in ruling on motions to dismiss. The combination of the Scheduling Order's provisions and the Court's dismissal of plaintiffs' common law claims means that any amended complaint should not include those claims.

8. The dismissal of the common law claims should be with prejudice for another reason: plaintiffs are incorrect in their assertion that none of the circumstances that would allow a court to deny a motion for leave to amend are present in this case. Pl. Opp. at ¶ 15 (citing Rolf v. City of San Antonio, 77 F.3d 823, 828 (5th Cir. 1996)). The claims the Court dismissed suffered from fatal flaws that amendment could not cure; amendment would therefore be futile because the amended complaint would still fail to state a claim. The Court ruled as a matter of law that New York's Martin Act barred plaintiffs' negligent misrepresentation claim. Plaintiffs cannot possibly correct this legal deficiency by re-pleading the claim. As for their common law fraud claim, plaintiffs do not point to a single specific fact relating to Goldman Sachs that would correct the legal deficiencies the Court found in that claim. The only specific reference plaintiffs make to "further facts" is to the Report of the Bankruptcy Examiner. Pl.

Opp. at ¶ 15. Goldman Sachs is not mentioned in that report. The dismissal was, and should remain, with prejudice.

Dated: January 21, 2004

Respectfully submitted,

By: 

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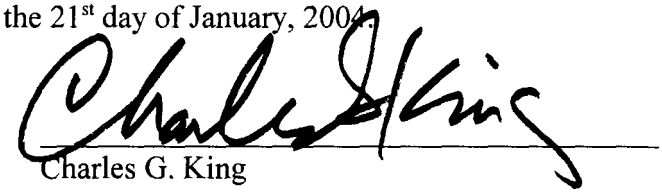
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served upon all known counsel of record by website, http://www.esl3624.com, pursuant to the Court's order dated August 7, 2002 (Docket No. 984), on this the 21st day of January, 2004.



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